Central Law Journal.

ST. LOUIS, MO., MARCH 18, 1910

JUDGES WORKING OUT THEIR PERSONAL CONVICTIONS.

We were much struck, upon reading the concurring opinion of Mr. Justice White in the case of Pullman Co. v. Kansas, 30 Sup. Ct. 232, by some remarks therein, which we will presently quote.

This case involved the same question as Western Union Tel. Co. v. Kansas, 30 Sup. Ct. 190, which we discussed in 70 Cent. L. J. 109. In that case a concurring opinion by Justice White rested itself upon the fact that a foreign corporation, engaged in interstate business being in Kansas already, it was confiscatory to impose such a condition to its doing local traffic, as was attempted. In the opinion in the Pullman Co. case he seems to have abandoned this theory and to insist that the cases, which decide that a state has the absolute power to exclude foreign corporations from its borders, do not necessarily mean that it has absolute power to prohibit the doing of local traffic by a foreign corporation which has the right of entrance for the transaction of interstate business. But he appears to stand alone in the view, that to interfere with such a corporation is a direct burden on interstate commerce.

He speaks of the state's power not being absolute to exclude from its borders a corporation engaged in interstate business, and as it seems to us he assumes that the power to exclude from local business is also not absolute, but only relative. But why, or in what way, it is only relative is not precisely indicated. As to other foreign corporations the incidental effect on interstate commerce is negligible, no matter how serious this incidental effect may be. It is not shown that the effect of prohibiting an interstate corporation from doing local business would do any more than take away from its volume of business, affecting thus, as we think, in an *incidental* way, interstate business, because the facilities of a particular kind of corporation have not so free a swing in every zone over or to which its *radii* extend.

We may imagine that the effect on interstate business might, so to speak, be more acute, but not less incidental. The consequences which ultimately influence interstate business arise from the same cause—the barrier against foreign corporations doing local traffic.

The remarks referred to above are the following: "None of the cases referred to prevent me, in this case, from acting upon my independent convictions, even if it be conceded that expressions may be found in the opinions in some of the cases, which, when separated from their context, and apart from the subject-matter of the controversies which the cases presented, would tend to conflict with the views I have expressed. This is said because certain is it that in none of the cases is the slightest reference made to the distinction between the absolute and relative power which this case involves, and the direct burden which must result to interstate commerce from the attempt to exert absolute power, where, as the result of the interstate commerce clause of the constitution, relative power alone obtains. When first, after the duty came to me of taking part in the work of the court, the question arose of the right of a state, in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my

duty to enforce in such a case the previous rulings of the court, however much, as an original question, I would have held a contrary view."

One cannot but ask himself whether Justice White would thus have theorized about absolute and relative power, if he had agreed with the principle in previous rulings. And yet, whether he agreed or not, obedience to all legitimate inference therefrom is as binding upon him as a judge as that which they directly hold. All judges should enforce precedents and inferences therefrom, which they apprehend alike, in an uniform way, whatever their prior opinions upon the questions involved.

There seems here, frankly expressed, the portrayal of an influence which is the fruitful womb of much of the lamentable contrariety manifesting itself in American decisions. It is the influence which leads to a sticking in the bark in the interpretation of decided cases. It is that which narrows the application of rulings, puts a strait jacket upon principles and makes of them not "wise saws," but only "modern instances."

By this course we do not regard our courts as builders of a system of jurisprudence. Instead, we seem to ignore courts as courts entirely, and look upon their presiding incumbents as appointed to place stepping stones of narrow breadth and doubtful stability in a sort of marsh. They may not rest on bedrock, or may be otherwise treacherous to the tread, and they are not pillars for a temple.

Constructiveness in precedent seems, indeed, to be vanishing from our judicial tribunals, and the spirit, which would refine away ruling and confine it to the strictest limits, has taken its place. This, however, would not be so great an evil, if the acumen which differentiates proceeded more from knowledge of legal principles than from intellectual acuteness or mere logical exactitude.

Distinctions which may be reasoned out in following the channels which flow from the fountains of jurisprudence exemplify the science of the law. Speculative differences which alertness in mentality may discover simply "pile Pelion on Ossa" in the tomes on tomes of print, whose authors might find it difficult, in later years, to remember their own contributions—as might everybody else, except they came to vex on being unearthed.

The feeling of the need of a basis for things—few and simple though they may be—is becoming widespread. Decisions in causes are but incidents. One litigant wins the other loses. A sovereign state has its courts to construe its enactments. It is a necessity of justice that they be consistently enforced. If the courts cannot breathe into them a fullness of life, the complexity of our civilization but multiplies the pitfalls of our time. This life cannot be imparted by judges merely resourceful in dialectics. They must be versed in the science of law.

But this declaration by the learned justice, though frank, seems, nevertheless, not to have been demanded or strictly appropriate. If he meant to say that prohibiting a foreign corporation engaged in interstate commerce from doing local traffic, is, of itself, to put a direct burden on interstate commerce, every judge on the bench accepting his premise would agree to his conclusion. If it merely produces an incidental effect, all would say the prohibition is valid, according to the very letter of prior decision, provided the requirement is not that the corporation lay a direct burden on interstate commerce or give to a state the right to tax property outside of its borders, as was ruled by the majority. In either event Judge White's remarks seem inapplicable.

The feature of these cases, which declares the tax illegal as based on outside property, would appear to make void the tax on all foreign corporations—as well those engaged in interstate commerce as those not so engaged. The state of Kansas appears to have overreached itself.

NOTES OF IMPORTANT DECISIONS.

DOWER—INCHOATE RIGHT AFFECTED BY BANKRUPTCY PROCEEDINGS AND BANKRUPT'S RESIDENCE.—Several questions quite interesting and important in reference to dower were disposed of by a bench in Eighth Circuit Court of Appeals, composed of Adams, C. J., Amidon and Riner, D. J.J., Thomas v. Wood, 173 Fed. 585. Amidon, D. J., wrote the opinion, from which Riner, D. J., dissented. That the casual personnel of benches in this class of courts appears to make decisions therein like a record of individual views, is why we often designate, as above, the participants in decisions.

The facts show that the bankrupt was a resident of Kansas, in which state there is no right of dower, but among assets of the bankrupt estate were lands in Missouri, whose courts hold that the right of dower there provided for accrues as well to non-residents as residents in lands there situated. This dower right attaches to land of which the husband is seized during the existence of the marriage relation, and not, as in one or more exceptional jurisdictions, at the time of the husband's death.

The contentions relied on against the wife's right of dower were that to apply dower rights of various states would destroy uniformity in the bankrupt act; that the right of dower is of the same class as that of exemptions and homesteads which are confined to bankrupt's domicile, and that the statute specifically provides that only dower right of residence shall prevail in bankruptcy administration.

The first contention is considered disposed of adversely by Hanover Natl. Bank v. Moyses, 186 U. S. 181, and a lengthy extract is also made from an early Circuit Court case, Darling v. Berry, 13 Fed. 659.

The second contention is also ruled adversely on the ground that the only similitude between rights of exemption and homesteads and that of dower is that all "are in a general way for the protection of the family. * * * The homestead and exemption are a part of the bankrupt's estate. * * Dower on the other hand, is no part of the bankrupt's estate." This is the gist of the argument on this subject. See also Randall v. Krieger, 23 Wall. 137.

The third contention was based on section 8 of the bankruptcy act, which reads as follows: "The death or insanity of a bankrupt shall not abate the proceedings. * * * Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence." The opinion gave four reasons why this section and proviso should not control; first they referred merely to death pending proceedings, and here the husband was still alive; second, the purpose was to provide for no abatement, and the proviso was merely cautionary as preserving all her rights where there was no death; third, the cautionary argument is an extension or fuller explanation of this theory; and, fourth, the proviso was in view of differing state laws as to right of dower, nine states giving dower only in real property of which the husband was seized at the time of his death, and some, dower rights in personal property of which he was so seized, while others give dower in real property of which he was seized during coverture, this view was upheld in In re McKenzie, 142 Fed. 383, as decided also by a bench of the same court. The proviso, therefore, was meant to prevent title, vested by bankruptcy proceedings in the trustee, from operating like a sale during coverture, as to land where relinquishment of dower was not necessary. This liberal view was not required as to the real estate here in question, as dower in Missouri applies in cases last above mentioned. But it is even doubted whether the section would be constitutional as applied to the case at bar, if it should be construed to apply to such a case because the wife's inchoate right of dower could not be thus displaced, because this is a vested right.

THE HISTORICAL INTERPRETATION OF "FREEDOM OF SPEECH AND OF THE PRESS."—PART II.—ILLUSTRATIVE QUOTATIONS SHOWING MEANING OF FREE SPEECH PRIVILEGE.*

The varying conception of limits of freedom of utterance, as advocated by these classes of controversialists, will now be exemplified by illustrative quotations, to the end of showing what was meant by an unabridged liberty of utterance, by those whose views were incorporated in our constitutions.

Licensing the Printer.—The Press was introduced into England by Henry VIII. From this fact, together with the prevailing opinion that the whole matter of freedom of speech was one of permission, or gift from the sovereign, nothing was more natural than that Edward the VI. should, by

* Part I. of this article appeared in last week's issue of this Journal.

patent, appoint a printer, who was to print and sell all Latin, Greek and Hebrew books, as well as all others that might be commanded, and penalties were denounced for infringing his monopoly. Subsequently the number of licensed printers was enlarged, but for a considerable time it was limited.[1] In this form of license the letter of the law made no discrimination against a book according to the sentiments expressed. The license seems rather to have been a business monopoly given to some court favorite, and a matter of confidence in the printer, as one having the discretion to publish nothing inimical to the grantors of his special privilege. Of course, this public printer did not publish for future reference any of the arguments against his monopoly. Could we now look back to analyze the opposition to this first form of licensing, we would seek for two possible explanations of it. According to one, freedom of the press might mean only the commercial freedom to use the press as a tool of trade, in commercial competition with the crown-monopolists, and a modern judge adopting that conception as a basis for constitutional construction, might uphold a law creating a censorship only over the character of the printed matter, and not directly and immediately effecting the equality of commercial opportunity in the use of the printing press as an instrument of commerce. According to this first point of view the abolition of this monopoly was the chief, or only, end in view, and this object would not be in the least interfered with by a new form of censorship directed against particular psychologic tendencies of opinions, which would leave intellectual liberty just as much abridged as before.

The other view would be that the opposition to licensing of the printer was based principally upon the demand for a larger intellectual liberty, by equalizing the opportunity of all for using the press as an extended form of speech. In this second view, the mere abolition of the license for printers monopoly is not an end in itself, but a mere means to the end of increasing intellectual liberty and opportunity, a viewpoint quite constantly ignored by our judicial utterances upon this subject. It is unthinkably paradoxical that the few friends of freedom of speech and of the press, who existed at that time, should have had no interest in the enlargement of intellectual liberty, and were interested only in the enlarged opportunity for the commercial use of the press as a tool of trade.

Of course, this view, that enlargement of intellectual opportunity was the chief end sought, is confirmed by the related controversial literature of approximately that time. As I write this I have before me a volume in which are reprinted the tracts on "Liberty of Conscience," which had been published prior to 1661. These express "the first articulations of infant liberty." The arguments are in the main very crude, as arguments for liberty. They may be clearly divided into a few general classes: First, "We dissenters are right, therefore ought to be tolerated;" second, "the Bible teaches toleration, therefore we should be tolerated;" third, "it is not in the power of man to believe as he wills, but he believes, as he must, and he therefore should not be punished for expressing convictions he cannot escape." This last is a good argument against the injustice of punishing "dangerous" opinions, even yet. But amid much crude thinking there are some few very clear perceptions, excluding all mere psychological crimes from the legitimate province of government. To this end Luther was quoted, and his thought is several times restated by different authors. Luther's words are these: "The laws of civil government extend no farther than over the body and goods, and that which is external. For over the soul (mind), God will not suffer man to rule." Such were the contentions made in behalf of liberty of speech, or "the liberty of prophesying," as it was then often called. One would look in vain through this volume of early tracts for any suggestions that the larger liberty contended for, or an unabridged freedom of dis-

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cussion, consisted only in the absence of a *prior* censorship. I do not even recall a single mention of a previous censorship as the essence of the evil, nor mere commercial opportunity to use the press as a tool of trade as an end to be achieved. Always the demand is for, and indeed the arguments were all in furtherance of a larger intellectual liberty and sometimes demanded an unabridged liberty of utterance by excluding all psychological offenses from the jurisdiction of the criminal law.

These early tracts, so far as they go, are a vindication of the contention, stated at the head of this essay, as that relates to the period prior to 1661. It is utterly absurd for our courts to intimate, as they do, that the real friends of unabridged intellectual opportunity were ever concerned only with the *mere time or manner* (rather than the *substance*) of the abridgement of liberty. The friends of freedom never sought the abolition of previous restraint in favor of subsequent punishment, as an end in itself, but were seeking to enlarge intellectual opportunity as against abridgement either by prior restraint or subsequent punishment.

No doubt it was in this early protest against a licensed printer that the phrase "freedom of the press" came into use, for here only does it have a literal signification. When the press was made free, as an instrument of trade, the shifty tyrant saw to it that no enlargement of intellectual opportunity resulted.

Usurpation by the "Star Chamber."—Prior to 1637 there seems to have been no criminal penalties inflicted by the English secular courts, for mere psychologic offenses, such as the expression of unpopular opinions. "The Common Law took cognizance of no injuries but such as effected persons or property."[2] In 1637 the Star Chamber, which never hesitated to assume the most preposterous powers, usurped the legislative functions of penalizing libel, by its decree to regulate the press.[3] This judicial lawlessness, in usurping the power to punish mere psychologic crimes under ex post facto criteria of guilt, of course provoked criticism from those who loved liberty and knew something of its nature, and no doubt it also secured for "the watchtower of the King" the hearty approval of all tyrants, for the protection of whose reputation and prerogatives this abridgement of freedom of utterance was inaugurated. This usurped censorship and the accompanying ex post facto penalization of mere psychologic crimes, was among the last and most hideous of the acts of this infamous "Judicial" body, for the Star Chamber Court was abolished in 1640. No doubt the hostility excited by its outrageous creation and enforcement of laws against mere verbal crimes, contributed much towards the downfall, but tyranny did not die with the institution that invented this special means to its end. The co-tyrants of the Star Chamber Court and their successors, prompted by the same inordinate lust for power and preferring to be relieved of the occasion for defending their official conduct, with slight modifications and very brief cessations, have continued to act upon the precedents of the abhorred Star Chamber, to this very day. Parliamentary enactment along similar lines soon took the place of Star Chamber decrees, and vagueness in the legislative definition of criminal libel left quite unimpaired the power for an ex post facto creation of the criteria of guilt. So it comes to pass that while maintaining some of the outward seemings of law, the fundamental evils of judicial despotism still exist, even in those countries whose inhabitants are most loud-mouthed in their stupid boast over a purely imaginary liberty. However, let it be said, that the savagery of the penalties has been a little abated, even though, on the whole, intellectual liberty has received no substantial enlargement. What has been gained as to

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some subjects has been lost as to others. Some comparison as to this would be interesting, but is not within the scope of this essay.

Licensing the Book.—The licensing of one printer was succeeded by the licensing of many and later to the abolition of this system in its entirety, allowing all alike to use the printing press as an instrument of commerce, but maintaining inequalities as to its use in the distribution of ideas. Here I have reference to those various licensing acts, expiring in 1694, which succeeded to the Star Chamber decrees, and by which a censor authorized particular books to be printed, and all publications not so authorized were penalized. It was against this censorship that Milton directed his immortal essay, "Aeropagitica."

Here again we must seek an answer to the same old question, is it true, as our courts generally assert, that Milton and others who opposed these licensing acts were only concerned with the *manner* and not with the *substance* of this abridgement of freedom of the press? Is it true, as our courts usually imply, that the opponents of these licensing acts demanded only the abolition of the censor and *previous restraint,* and were quite willing to admit a power to punish subsequent to publication, all those opinions which formerly had been denied the necessary license for getting into print? In Milton's time one might print unpopular opinions, which the licensor had disapproved, and be punished if caught. This the Supreme Court of the United States says is an *abridgement* of freedom of the press. However, if there is no previous censorship, and although you receive the same penalty, merely for publishing the same book, because a legislature or jury deem it contrary to the public welfare, then *unabridged liberty of the press is thereby preserved,* for the "greatest judicial tribunal on earth" has said that a constitutionally guaranteed, natural right, to *unabridged* freedom of press, "is to prevent all such previous restraint as had been practiced by other governments and *does not prevent the subsequent punishment of such as may be deemed against the public welfare.*"

In other words, our courts declare that our constitutional right to unabridged freedom of utterance deals only with the manner and time of the abridgement, or the tribunal which inflicts it, and has nothing to do with unabridged intellectual opportunity to utter, to hear and to read. Be it remembered, however, that no such distinction, in favor of any ex post facto censorship, can be deduced from the very words of our constitutions, nor from the historical controversy culminating in their adoption, and therefore, these exceptions to unabridged freedom are a matter of judicial creation—that is, of judicial constitutional amendment.

In Defense of the Censorship.—Then, as now, the advocates for the suppression of unpopular opinions refused to see that to admit the existence of the power to suppress any opinion, in the long run, is more destructive to human well-being than the ideas against which they would have the power exercised. Then, as now, the alleged immediate public welfare was the justification of every form of censorship, and some dangerous tendency, only speculatively ascertained and usually so in a feverishly apprehensive imagination, was always the test of guilt. "The most tyrannical and the most absolute governments speak a kind parental language to the abject wretches who groan under their crushing and humiliating weight.[4] To make this clear it is necessary to quote only a few passages from a publication dated A. D. 1680, and written in defense of the abridgements of freedom of speech and press. Sir Robert L'Estrange in, "A Seasonable Memorial in Some Historical Notes Upon the Liberties of the Press and Pulpit," quotes Calvin as saying: "There are two sorts of seditious men, and against both these must the sword be drawn; for they oppose the King and God himself." He then exhibits the evolution of dangerous tendencies by these words: "First they find out corruptions in

(4) Erskine in Defense of Carnan.

the government, as a matter of grievance, which they expose to the people. Secondly, they petition for redress of those grievances still asking more and more, till something is denied them. And then, thirdly, they take the power into their own hands of relieving themselves, but with oaths and protestations that they act only for the common good of King and Kingdom. From the pretense of defending the government they proceed to the reforming of it; which reformation proves in the end to be a final dissolution of the order, both of Church and State. * * * * * * Their consciences widened with their interest. * * * * * * First they fell upon the King's reputation; they invaded his authority in the next place, after that they assaulted his person, seized his revenue; and in the conclusion most *impiously* took away his *sacred* life * * * * *The Transition is so natural from popular petition to a tumult, that the one is but a hot fit of the other; and little more than a more earnest way of petitioning.* * * * * They preach the people into murder, sacrilege and rebellion; they pursue a most gracious prince to the scaffold; they animate the regicides, calling that execrable villainy an act of public justice, and entitling the Holy Ghost to treason."[5]

This argument, backed by the historical fact, is unanswerable to the point that to permit freedom of criticism of government and its officials, and to allow the presentation of petitions for the redress of grievances, is to permit that which tends to promote actual treason and rebellion. It follows that those who were demanding the opportunity to express their sentiments in criticism of official conduct were in effect demanding the right verbally to promote treason with impunity, because that was the demonstrated tendency of such utterances. That is what unabridged freedom of speech and of the press meant to its advocates, and our constitutional guarantee for an *unabridged* freedom of utterance was a final decision in favor of that view and against all mere psychologic crimes. including even verbal "treason."

The Defense of Freedom, by Milton.—In further justification of the contention that *unabridged* freedom of utterance as a matter of right precludes the suppression of opinions having a "dangerous" tendency, either by direct prior restraint, or subsequent punishment, the fear of which always operates as a prior restraint, we should contrast the foregoing argument for restricting speech with the historic argument for freedom made in Milton's "Aeropagitica." Here we can quote only a few paragraphs tending to show what freedom of speech meant to its friends. Not a word *can be* found to suggest ex post facto punishment as a substitute for previous restraint.

Milton writes: "Till then, books were ever as freely admitted into the world as any other birth; the issue of the brain was no more stifled than the issue of the womb. * * * * * 'To the pure all things are pure,' not only meats and drinks, but all kinds of knowledge, whether of good or evil; the knowledge cannot defile, nor consequently the books, if the will and conscience be not defiled. For books are as meats and viands are; some of good and some of evil substance; and yet God in that unapocryphal vision said, without exception, 'Rise Peter, kill and eat,' leaving the choice to man's discretion. Wholesome meats to a vitiated stomach differ little or nothing from unwholesome, and best books to a naughty mind are not unapplicable to occasions of evil. Bad meats will scarce breed good nourishment in the healthiest concoction; but herein the difference is of bad books, that they to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate. * * * * All opinions, yea, errors, known, read and collated, are of main service and assistance toward the speedy ascertainment of what is truest. * * * * For those actions, which enter into a man rather than issue out of him and therefore defile not. God uses not to captivate under a perpetual child-

(5) In addition to "A Seasonable Memorial," see for similar argument, "A Discourse of Eccleciastical Politie, Wherein the Mischiefs and Inconveniences of Toleration Are Represented," London, 1670.

hood of prescription, but trusts him with the gift of reason to his own chooser. * * * * * * *

"I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity, much rather; that which purifies us is trial, and trial is by what is contrary. That virtue which is but a youngling in the contemplation of evil, and knows not the utmost that vice promises to her followers, and rejects it, is but a blank virtue, not a pure; her whiteness is but an excremental whiteness."

"Since, therefore, the knowledge and survey of vice is in this world so necessary to the constitution of human virtue, and the scanning of error to the confirmation of truth, how can we more safely and with less danger scout into the region of sin and falsity, than by reading all manner of tractates, and hearing all manner of reason?" "Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards. * * * * * Give me the liberty to know, to utter and to argue freely according to conscience above all liberties."

"Though we take from a covetous man all his treasure, he has yet one jewel left; you cannot bereave him of his covetousness. Banish all objects of lust, shut up all youth into the severest discipline that can be exercised in any hermitage, ye cannot make them chaste that come not hither so."

And yet Milton, though he made an unanswerable argument for a totally unabridged freedom of utterance, he could not get wholly beyond all his religious prejudices, and so, although the argument made no provision for it, he found it necessary dogmatically to provide for one conception. "I mean not tolerated Popery and open superstition, which as it extirpates all religious and civil supremacies, so itself should be extirpated." While Milton thus fell short of an unlimited intellectual toleration he yet furnished an immortal statement of reasons to guide us to an unabridged freedom of utterance, and to the invalidating of his own exception thereto.

Spinoza.—To this same period belong the writings of Spinoza. As is to be expected, his viewpoint is different from the others of his time.

He concludes: "We have shown already that no man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and free judgment, or be compelled to do so. For this reason the government which attempts to control minds is accounted tyrannical, and it is considered an abuse of sovereignty, and a usurpation of the rights of subjects, to seek to prescribe what shall be accepted as true, or rejected as false, or what opinnons shall actuate men in their worship of God. All these questions fall within a man's *natural right,* which he cannot abdicate even with his own consent. * * * * The individual justly cedes the right of free action, though not of free reason and judgment. No one can *act* against the authorities without danger to the state, though his feelings and judgment be at variance therewith. He may even speak against them, provided that he does so from rational conviction, not from fraud, anger, or hatred, and provided that he does not attempt to introduce any change on his private authority. * * * * Thus we see how an individual may declare and teach what he believes, without injury to the authority of his rulers, or to the public peace; namely, by leaving in their hands the entire power of legislation *as it effects action;* and by doing nothing against their laws, though he be compelled often to act in contradiction to what he believes, and openly feels to be best. From the fundamental notions of a state, we have discovered how a man may exercise free judgment without detriment to the surpeme power; from the same premises we can no less easily determine *what opinions would*

be seditious. Evidently those which by their very nature nullify the compact by which the right of free action is ceded. * * * * *

"If we hold to the principle that a man's loyalty to the state should be judged, like his loyalty to God, *from his actions only*—namely, from his charity towards his neighbors—we cannot doubt that the best government will allow freedom of philosophical speculation, no less than of religious belief. I confess that from such freedom inconveniences may sometimes arise, but was any question ever settled so wisely that no abuses could possibly spring therefrom? He who seeks to regulate everything by law, is more likely to arouse vices than to reform them."

From these quotations it appears that Spinoza did not believe in an *unabridged* freedom of utterance. His belief in the psychologic crime of a mere verbal treason, though limited within unusually narrow range, followed logically from his erroneous conception of the sphere of government. Of this he said: "The rights of the sovereign are limited by his power." Since in his theory of government sovereign rights arise out of a cession of freedom of action by the citizen, the opinion which nullified that hypothetical compact could be called treason so long as the sovereign had the power to suppress it as such. It is quite probable, and at least consistent with his theory, that this exception may have been made by Spinoza as a condition of securing tolerance for the rest of the argument in favor of free speech.

However that may be, as Spinoza repudiated the exception to unabridged freedom of utterance, reserved by Milton, so the latter annihilated the one exception made by Spinoza. The premises of each exception were specifically repudiated by the American Declaration of Independence, and American constitutions, and hence these exceptions to unabridged liberty of utterance must also fall. However, the matter that I now wish specially to emphasize is this: The very nature of these arguments for larger freedom is such as utterly to destroy our judicial assumption that the friends of unabridged freedom of utterance, who framed our Constitutional Guarantees, meant only to provide for ex post facto punishment as a substitute for previous restraint.

Montesquieu.—Some years after the death of Milton came the birth of Montesquieu, who "commanded the future from his study more than Napoleon from his throne" and whose book on "The Spirit of the Laws," "probably has done as much to remodel the world as any product of the eighteenth century, which burned so many forests and sowed as many fields."

In the opinion of Justice O. W. Holmes "Montesquieu had a possibly exaggerated belief in the power of legislation," which alone would not predispose him against censorship. The frequent reference to him in The Federalist and other discussions of the revolutionary period, as well as our constitutions themselves, all show how the thought provoked by his book helped to shape our institutions. This makes it all the more important to ascertain his view upon the province of the state in relation to the liberty of speech and press, because of their quite direct bearing upon the historical interpretation of our constitution.

On the subject of religion he emphasizes the essential difference of human and divine laws, and argues reservedly for general toleration of all religion and concludes: "When the legislator has believed in a duty to permit the exercise of many religions it is necessary that he should enforce also a toleration among these religions themselves. * * * * * * * * *Penal laws ought to be avoided in respect to religion.*"

In the matter of verbal treason Montesquieu seems very exact in his statements, and comprehensive in his thought. Only a few lines will need quoting. He says: "Nothing renders the crime of high treason more arbitrary than declaring people guilty of it of indiscreet speeches. * * * * * * Words do not constitute an overt act; they remain only in idea. When considered by themselves, they have generally no determinate signification, for this depends on

the tone in which they are uttered. * * * * Since there can be nothing so equivocal and ambiguous as all this, how is it possible to convert it into a crime of high treason? Wherever this law is established there is an end not only of liberty, but even of its very shadow. * * * * * *

"Overt acts do not happen every day; they are exposed to the naked eye of the public, and a false charge with regard to matters of fact may be easily detected. Words carried into action assume the nature of that action. Thus a man who goes into a public maket-place to incite the subject to revolt incurs the guilt of high treason, *because the words are joined to the action; and partake of its nature. It is not the words that are punished, but an action in which words are employed. They do not become criminal, but when they are annexed to a criminal action; everything is confounded if words are construed into capitol crime, instead of considering them only as a mark of that crime.*"[6]

In this evolution to a clearer conception of the issues and the more exact statement of the claims of contending parties, we have now reached the place where unabridged intellectual liberty is defined by excluding from the category of crime every offense founded upon speech, *merely as such.*

Blackstone and His Critics.—Blackstone was the victim of most of the popular superstitions of his time, from witchcraft down. Of course, he endorsed the current theory of government and consequently the current abridgements of freedom of speech and press. He had no desire or intention to vindicate man's natural right to such liberties *unabridged*, but approved and made declarations of the laws in operation, as he found them. Thus he wrote: "Everything is now as it should be with respect to the spiritual cognizance, and spiritual punishment of heresy; unless perhaps that *the crime ought to be more strictly defined*, and no persecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previous declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics, yet not to harass with temporal penalties, much less to exterminate or destroy them."[7]

These spiritual censures and excommunication involved indirect penalties, such as incapacity for "suing an action, being witnesses, making a will, receiving a legacy," etc., and these indirect consequences it would seem that Blackstone approved.

Again he writes: "The (some not unabridged) liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. * * * * * To subject the press to the restrictive power of a licensor, as was formerly done, * * * * is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But *to punish, as the law does at present*, any dangerous or offensive writings, which, when published, shall on a fair and unpartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government, and religion, the only solid foundations of civil liberty."[8]

It should be apparent from the mere reading that Blackstone was defending and describing only such *limited liberty by permission*, as was then enjoyed in England, and never intended either to define or defend *unabridged* freedom of discussion, as that was contended for by his opponents, whose views, and not Blackstone's, were adopted into our constitutions. For this reason one may well be surprised to find the foregoing statement from Blackstone quoted by American courts as an authority on the meaning of *unabridged* freedom of utterance, which he never mentions.

(6) Vol. I., p. 234, Aldine Edition.

(7) Vol. IV., Commentaries, p. 49.
(8) 4 Blackstone's Commentaries, 151.

One of Blackstone's critics, whose book went through more than one edition and of whom it is said:[9] "he induced the learned commentator (Blackstone) to alter some positions in the subsequent edition of his valuable work," had this to say as to the meaning of unabridged freedom of speech:

"For, though calumny and slander, when affecting our fellow men, are punishable by law; for this plain reason, because an injury is done, and a damage sustained, and a reparation therefore due to the injured party; yet, this reason cannot hold where God and the Redeemer are concerned; who can sustain no injury from low malice and scurrilous invective; nor can any reparation be made to them by temporal penalties; for these can work no conviction or repentance in the mind of the offender; and if he continue impenitent and incorrigible, he will receive his condign punishment in the day of final retribution. Affronting Christianity, therefore, does not come under the magistrate's cognizance, in this particular view, as it implies an offense against God and Christ."[10] Here is again a clear recognition and plain statement, which, like Montesquieu's, demands that actual and material injury shall be the basis of prosecution and not mere speculation about psychologic tendencies.

Mansfield and Kenyon.—Some of our courts, in addition to Blackstone, cite Lords Mansfield and Kenyon as authorities on the meaning of unabridged freedom of utterance, as though their views had been adopted into our constitutions. Concerning these opinions Sir James Fitz James Stephens (after quoting the differing definitions of Lords Mansfield and Kenyon as showing what was the official conception of freedom of the press) says: "Each definition was in a legal point of view complete and accurate, but what the public at large understood by the expression was something altogether different—namely, the right of unrestricted discussion of public affairs."[11]

(9) Allibone's Dictionary of Authors.

(10) Furneaux's Letters on Toleration, p. 70-71.

(11) Vol. 2 Crim. Law of Eng. p. 349.

In other words the judicial conception of free speech was an abridged free speech, and the popular demand was for an *unabridged* free speech. It should need no argument to prove that the latter, and not the former, was intended to be adopted into American constitutions, and to me it is difficult to account for the contrary opinion, often expressed by our courts, which quite uniformly ignore even the existence of the pre-revolutionary contention against the English official conception, as expressed by the Star Chamber, the English Parliament, Blackstone, Mansfield or Kenyon.

Bishop Horsley, Rev. Robert Hall, and Thomas Jefferson.—The issue between "freedom of the press" in the official English sense, on the one side, and *unabridged* freedom of utterance on the other, was made clear in another English controversy following so close upon the heels of our adoption of the first amendment, as to be fairly considered an English aftermath of that agitation and of the American Revolution.

Bishop Horsley on January 30, 1793, delivered a sermon before the House of Lords wherein he indulged in a severe censure of that "Freedom of dispute" on matters of "such high, importance as the origin of government, and the authority of sovereigns," in which he laments that it has been the "folly of this country for several years past" to indulge. Of the divine right of Kings he declared: "It is a right which in no country can be denied without the highest of all treason. The denial of it were treason against the paramount authority of God."

These premises had recently been repudiated by our Declaration of Independence and by the American constitutions, and by the friends of unabridged freedom of utterance everywhere. One of the conspicuous critics of Bishop Horsley was the Rev. Robert Hall. In arguing against the rightfulness of punishing mere psychologic crimes he laid down the limits of governmental action which must be adhered to if freedom of speech is to remain an *unabridged right*, instead of mere limited liberty by

permission. He said: "The law hath amply provided against *overt acts of sedition and disorder,* and to suppress mere opinions by any other method than reasoning and argument is the height of tyranny. Freedom of thought being intimately connected with the happiness and dignity of man in every stage of his being, is of so much more importance than the preservation of any constitution, that to infringe the former under pretense of supporting the latter, is to sacrifice the means to the end."[12]

In his discourse this reverend author often emphasizes the difference between ideas and overt acts and makes plain over and over that in his view actual injury should be the criteria guilt, and not mere apprehension as to a psychologic tendency. Our constitutional definition of Treason and the guarantees for the right to carry arms for "due process of law," and for unabridged freedom of utterance, show that it was such views as Milton argued for, and as Montesquieu and the Rev. Robert Hall expressed, and not the views of Blackstone, Mansfield, Kenyon, or Bishop Horsley, that our constitutions sought to effectually perpetuate.

Both before and after these utterances by the Rev. Robert Hall, there was most eminent American authority for the same interpretation of the meaning of a "free press." Thomas Jefferson is popularly supposed to have had much to do with framing the Declaration of Independence, and shaping our American institutions. He was a dominant figure in Virginia politics for many years. Those who have familiarized themselves with the religious views of Jefferson,[13] will not doubt that he encouraged the passage of the Act of the State of Virginia, establishing religious freedom. Although drafted only with a view to theological subjects, yet it contains a summary of incontrovertible reasoning in favor of the general liberty of inquiry and a clear statement as to where the jurisdiction of the state may be rightfully invoked without abridging intellectual liberty. The Virginia enactment says: "To suffer the Civil Magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all liberty, because, he being, of course, judge of that tendency, will make his opinions the rule of judgment; and approve or condemn the sentiments of others, only as they shall square with or differ from his own. *It is time enough* for the rightful purposes of civil government for its officers *to interfere when principles break out into overt acts against peace and good order.*"[14]

The Virginia declaration was made in 1786, several years before the adoption of the first amendment to the Federal constitution. The Virginia enactment makes it clear that in their opinion the state has no rightful authority over opinion of any sort, and should not be suffered to interfere until *actual* injury has resulted. It was that conception of "freedom of the press," which America adopted, and not the English tyrants' conception, to which it was opposed, and which originated in the odious Star Chamber found a palatable justification in Blackstone and the English judicial decisions, and an official re-echo in American courts, while engaged in explaining away our constitutional guarantee for an *unabridged* freedom of utterance.

When the Federalist party was defeated because of its enactment of the Alien and Sedition Law, and Thomas Jefferson became President of the United States, he proceeded to pardon every man who had been convicted under this infamous statute. That the penalized utterance *tended* to sedition made no difference to him, which indicates that he, too, endorsed the views of Montesquieu, the Rev. Robert Hall, and the quoted enactment of the Virginia legislature, as being the correct interpretation of the words "unabridged freedom of speech and of the press." Jefferson's own statement as to his conduct is as follows:

(12) An Apology for Freedom of the Press, 18.

(13) See Six Historic Americans.

(14) Requoted from Wortman's, Liberty of the Press, p. 173.

"I discharged every person under punishment or prosecution under the sedition law, because I considered and now consider that law to be a nullity, as absolute and as palpable as if congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its progress in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image. It was accordingly done in every instance, *without asking what the offenders had done*, or against whom they had offended, but whether the pains they were suffering were inflicted under the *pretended sedition law*. It was certainly possible that my motives in contributing to the relief of Callandar, and in liberating sufferers under the sedition law, might have been to protect, reward and encourage slander; but they may also have been those which inspire ordinary charities to objects of distress, meritorious or not, or, the *obligation of an oath to protect the constitution*, violated by an authorized act of Congress."[15]

This action on the part of President Jefferson was consistent with the issue upon which he was elected, and was required by his own conception of what was meant by an unabridged "Freedom of Speech and of the Press" as applied to verbal treason. His views are thus expressed in his first inaugural address: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it."

These discussions again proclaim the historic view that *unabridged* freedom of utterance means that every man may say with impunity whatever he pleases, being held responsible and punishable only for *actual* resultant injury, that being the only abuse of such freedom which can be penalized.

THEODORE SCHROEDER.

New York City.

(15) See 4 Jefferson's complete works, 556, quoted in Booth's v. Rycroft, 3 Wis. 183.

CARRIERS—SUIT BY CONSIGNOR.

ATLANTIC COAST LINE R. CO. v. MEINHARD, SCHAUL & CO.

Supreme Court of Georgia, Dec. 24, 1909.

For the value of goods sold and consigned to a vendee, and lost in transit by a common carrier, a right of action exists in the vendor against the carrier, who had receipted the vendor for them and recited in the receipt that the goods were "to be delivered * * * without unnecessary delay" to the vendee, although the vendee may have paid for the goods and the freight thereon.

The ruling just announced resulted from the general rule that a consignor who has no title to the goods lost may maintain an action for breach of the contract of carriage. See, on the general subject, C. & A. R. R. Co. v. Shea, 66 Ill. 472(5); Great Western R. Co. v. McComas, 33 Ill. 185; Carter v. Southern Ry. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354; Southern Ry. Co. v. Johnson, 2 Ga. App. 36, 58 S. E. 333; Ross v. Chicago, R. I. & P. R. Co., 119 Mo. App. 290, 95 S. W. 977; Hooper v. Chicago & S. W. Ry. Co., 27 Wis. 81, 9 Am. Rep. 439.

ATKINSON, J.: Judgment affirmed. All the Justices concur.

NOTE—*Right of Consignor from Whom Title Has Passed to Sue for Loss of Property.*—The principal case is a syllabus decision, with no accompanying opinion. The Carter case, which is referred to, did not really involve the question decided, but only whether suit could be brought by the agent of the consignor instead of the consignor himself, and the facts show that the consignor was the owner. But the individual judge discourses upon the question and all of his obiter remarks have been taken notice of. We had supposed that a court using the syllabus decision idea would be less apt to fall into the bad habit of perpetuating *dicta* than other courts, but we do not know. The question was, however, so thoroughly and ably discussed that this journal annotated what the judge said. 51 Cent. L. J. 233. Our annotation there produces authority to the effect that actions by consignees are in tort. We submit hereinafter cases of later dates than our annotation, and it seems to us that the tendency is more and more to make the test of right to sue that of ownership and disregard the form of action. Judge Nortoni of the St. Louis Court of Appeals, in a case we refer to somewhat at length hereinafter, states the only plau-

sible theory of consignor's right to sue where he has no interest in the property, and he alludes to Missouri statute requiring actions to be brought in the name of real party in interest. We think the learned judge wrong both as to right to sue, and that statute does not control, as is the Indiana idea hereinafter shown. Judge Nortoni's idea of the statute is that it is met by consignor being the trustee of an express trust, but we think, if the statute is operative at all in the matter, it ought to control absolutely and exclusively. These observations we expect to be understood when the following cases are considered: In Pratt v. Exp. Co., 13 Idaho, 373, 90 Pac. 341, 10 L. R. A. (N. S.) 499, the facts showed a delivery of money by shipper to an express company simply with direction to deliver it to his consignee, and consignee as plaintiff sued therefor. It was consigned to pay an indebtedness by the shipper to plaintiff. The money was stolen from the office of the defendant at the initial point of shipment. The Idaho court, premising, that the question for decision was whether the shipper or consignee should bring the suit reviews a great number of cases, some of which here follow. In Pennsylvania (Griffith v. Ingledew, 6 Serg. & R. 429); in England (Coombs v. R. Co., 3 Hurlst. & N. 510); in New York (Ogden v. Coddington, 2 E. D. Smith, 317); in Alabama (Exp. Co. v. Armstead, 50 Ala. 350) it is ruled, that the test of the right to sue is who is owner of the shipment. The Pratt case cited Bernstine v. Exp. Co., 40 Ohio St. 451, where the shipment was to pay a debt. There the principle was admitted, but the court distinguished the case, holding the shipper had the right to sue, because as the creditor had not directed him to send by express and his duty was to pay in person, the loss primarily fell on the debtor. The Idaho case, in which the consignee sued, held in his favor, because this, operating to ratify the delivery to the express company, released the debtor and made a bar in favor of the express company.

In Gratiot St. Warehouse Co. v. R. Co., 124 Mo. App. (St. L. Ct. of App.) 545, Judge Nortoni said "it is now well settled in the law of this and many other states, following the early case of Blanchard v. Page, 8 Gray, 281, where Judge Shaw announced the principle that even though the consignor had no property or interest in the goods, he is a proper plaintiff in an action for a breach of the contract on the ground that he has an interest in the contract. "The doctrine proceeds upon the contractual priority existing between the original parties which operates a cause of action, after the carrier's service is performed thereunder, in favor of the carrier and against the consignor for the freight, and for this reason conversely renders the shipper, although not the owner of the goods, a party in interest to the contract." This looks like an intangible abstraction and a something which is *res alios acta* so far as the consignee's rights are concerned, for it must be held that, if the consignor has a right to sue, the judgment in the suit ought to be a bar. If it is lost the consignee could not complain, and if it is won, he has to trust to the consignor for a proper adjustment of the matter. Also, though the learned judge says this principle is well settled in Missouri and other states and he cites four prior decisions of Missouri courts in support, we find in the same volume that he writes in a case by Kansas City Court of Appeals, in which it does not appear that court feels the like confidence. Norris & Steadley v. R. Co., 124 Mo. App. 16.

In that case the contention was made that the consignees were the owners and plaintiffs' consignors were not proper parties, and this was answered by the court saying the plaintiff having shipped the goods to be paid for on arrival were the owners. This latter court, the same judge writing the opinion for the same bench, just one year before, had the same question up. Ross v. R. Co., 119 id. 290. There it is said: "But there are other respectable authorities that hold to the view that a person having no interest in the property shipped, if he be the consignor and pays the charges, may maintain an action against the carrier for loss or damage to the same during transportation. Our own Supreme Court holds: 'Suit on a transportation contract is properly brought in the name of the consignor, whether he be the owner or not. Atchison v. Railway, 80 Mo. 213.' We believe, however, this is the only case found in our reports that has any direct bearing on the question." This case is very scant, but the petition sounds in tort, and all that is said is: "Atchison, in whose name the contract for the transportation of the cattle was made, was the proper party to sue, and the petition sufficiently shows that he was the consignor. Who the owner was is immaterial. Harvey v. Railroad, 74 Mo. 538." Going back to that case we find that it held that the real owner could not sue where one having possession of a racehorse of plaintiff, shipped him to Philadelphia, at a reduced valuation to be entered in the races, but not to plaintiff as consignee. The case merely held that as the owner did not under his contract with the shipper "have the right of possession of the horse injured," the party having such right must sue. That contract constituted the shipper a bailee having a special property, and he, of course, could sue, whether the general owner might or not.

In Chicago & E. I. R. Co. v. Boggs, 134 Ill. App. 348, a much later case than the Illinois cases cited by the principal case, plaintiff, seller, shipped f. o. b. a car load of corn, which arriving in a damaged condition the consignee, who only agreed to accept same if up to a certain grade, rejected the shipment. The court said, in answer to the contention, that only the purchaser had any right of action against the carrier: "The corn having failed to come up to grade at Nashville, and the purchaser not asserting any rights under his contract of purchase and bill of lading, which appellee had indorsed and delivered to it, the sale was never consummated, and the right of action for damages against the party responsible therefor is in the appellee." It thus looks like the Illinois rule is not greatly the way of the principal case.

In St. Louis & S. F. R. Co. v. Stone (Kans.), 97 Pac. 471, the right of action in shipper was sustained, expressly on the theory that there was not a consummated sale to the consignees by delivery on board the cars under the facts of the case. It was upon this the case was distinguished from those where title passed by such delivery.

In Grenvitz v. Weir, 112 N. Y. Supp. 557, 127 App. Div. 352, the following very brief opinion is by Judge Gaynor: "The plaintiff has recovered judgment for $167.50 for goods shipped by him by the defendant express company and lost by it. It is enough that the plaintiff did not own the goods.

He received them by express for inspection and to be returned to the sender within five days if they did not suit him, and he returned them by the defendant. The person to bring the suit is the owner. Sweet v. Barney, 23 N. Y. 335; Knilder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402." This case is an excellent illustration of how foolishly the consignor idea would work. A party of that kind might be a very irresponsible individual, and, at all events, any consignor, who would be merely suing for another's benefit, would not be supposed to act with as much diligence in doing a favor for another, as he would act in his own behalf.

In a still later New York Supreme Court case, sitting in appellate division, a *per curiam* opinion it was squarely ruled that where the presumption that title passes to the consignee exists, and there is no proof to rebut this, the consignor has no right of action. Wertheimer v. Wells Fargo & Co., 112 N. Y. Supp. 1062.

In Mattheson v. Southern Ry., 79 S. C. 155, 60 S. E. 437, it was held that where delivery was to be made at destination, the title and action for loss remains with the seller, In the opinion it is said: "The general rule is that delivery to the carrier is delivery to the consignee, and on such delivery the title passes to consignee; the goods then being at the consignee's risk, he has the right of action for their loss."

In Cleveland C. C. & St. L. Ry. Co. v. Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480, the matter is ruled by force of statute requiring suit to be in the name of the real party in interest, and thereunder it is held that the consignee must sue unless the presumption of title in him is rebutted. Therefore it was held that a complaint by a consignor against a carrier for misdelivery stated a cause of action by alleging that certain machinery "was then and always has been the property of the plaintiff, which defendant agreed to carry." Cleveland, C. C. & St. L. R. Co. v. Pitts & Co., 33 Ind. App. 564, 71 N. E. 685. See also Union Pac. R. Co. v. Metcalfe, 50 Neb. 452, 69 N. W. 961. If he ships to his own order he is presumed, in the absence of evidence to the contrary, to have intended to retain the title. Missouri Pac. R. Co. v. Lau, 57 Neb. 559, 78 N. W. 291.

In Minnesota the right of action in owner appears to be distinctly recognized. It was there contended that "the consignor cannot maintain the action and that the consignee alone can do so," and the case cited in support of this so held, with the proviso that the presumption of ownership was rebuttable and in the case at bar this was rebutted. Jarrett v. R. Co., 74 Minn. 477, 77 N. W. 304. The theory of ownership being the test of who should sue was applied in Tennessee Supreme Court to the case of a merchant shipping goods to be sold on commission. The court said: "The apples were consigned to Kaiser Bros., to be sold by them on commission and they were not sold to them, and the fact that they were thus consigned, did not vest the title in them. Until sold the title to the apples was in Deakins and at no time was it in Kaiser Bros." Therefore the consignor was held to be the proper party plaintiff. Railroad v. Deakins, 107 Tenn. 522, 64 S. W. 477. C.

HUMOR OF THE LAW.

"President Roosevelt was always fond of telling stories about his experiences in the New York Assembly," said a member of Congress the other day, who was a frequent visitor at the White House in the evening.

"I recall one that he told with much amusement. Colonel Murphy, of New York, was chairman of a committee which was holding public hearings. One day the Colonel lunched plentifully and well. When he returned to the committee room a slim little chap addressed the committee. The colonel fell asleep and woke up when the little lawyer was eloquently summing up his case. The colonel blinked, rubbed his eyes and shouted:

"'You have been here before. What do you mean by making two speeches before this committee?'

"'I have not appeared before your honorable committee before,' protested the little lawyer.

"'Don't contradict the chair,' yelled the colonel. 'Sit down.'

"The next man to address the committee was a big-voiced fellow who spoke loudly and feelingly of the downtrodden millions. The colonel listened for a few moments and then began to doze and finally to snore. He was aroused from his slumbers by a particularly eloquent outburst. The colonel awoke with a start.

"'You have been here before,' he shouted.

"'I haven't,' replied the speaker, in equally loud stones.

"'Don't you dare contradict the chair,' roared Murphy.

"'Well, I haven't been here before,' persisted the speaker.

"'Put him out,' ordered Murphy. 'The committee stands adjourned.'"

Many stories are current in legal circles regarding ex-Judge W. T. Wallace, one of the best known jurists in the history of San Francisco, but here is a new story vouched for by Billy Barnes, at one time district attorney. It runs thus:

"Wallace was examining a candidate for admission to the bar. All the questions had been satisfactorily answered and the lawyer-to-be had passed so brilliantly that Wallace decided to put a simple question to terminate the ordeal. Gazing benignly at the young man, he asked.

"What is the liability of a common carrier?"

"Although lawyers the world over and from time immemorial have wrestled with this problem, though millions of words have been taken into the record of various cases in which this unanswerable question was involved, the fledgling calmly eyed the judge and at last solemnly replied:

"'Your honor, I must beg you to withdraw that question. I did know the answer, but unfortunately I have forgotten.'

"For a minute Wallace eyed the young man, then turning to the lawyers who were grouped around him, remarked:

"'Gentlemen, this is a sad case, in fact a calamity. The only living man who ever knew the liability of a common carrier has forgotten.'"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Abatement and Revival**—Premature Action.—Where a plea of nonaccrual of a cause of action is sustained, the action should be abated, though the right accrues before trial.—Jones v. Dyer, Ark., 123 S. W. 757.

2.——Substitution of Parties.—Where a husband, who was sole plaintiff, died pending an action relating to land, his widow may be substituted as plaintiff on suggestion of his death and of her interest.—Bale v. Bale, Ill., 90 N. E. 233.

3. **Accident Insurance**—Renewal of Policy.—A mere soliciting agent had no authority to continue an accident policy in force by issuing a renewal receipt to insured without payment of the premium due.—Pacific Mut. Life Ins. Co. v. Carter, Ark., 123 S. W. 384.

4. **Adoption**—Domicile.—That a foreign adopted child was not domiciled in Tennessee at the time of the death of his foster parent, and that the status of the parent's brother as his heir was fixed at the parent's death, could not preclude the adopted child from asserting the principle of comity in support of his adoption rights.—Finley v. Brown, Tenn., 123 S. W. 359.

5. **Adverse Possession**—Occupancy.—Occupancy to a division fence, though erected by mistake as to the true boundary line, held to constitute adverse possession.—Bayhouse v. Urquides, Idaho, 105 Pac. 1066.

6. **Animals**—Fences.—Only substantial compliance with Rev. St. 1890, sec. 3295, is required in the construction of a fence sufficient to turn swine, so that an instruction that plaintiff could not recover therefor, if any of the posts were more than 16 feet apart, was properly refused.—Sharp v. Quincy, O. & K. C. Ry. Co., Mo., 123 S. W. 507.

7. **Assault and Battery**—Self-Defense.—Though defendant's purpose in entering prosecutor's house was unlawful, where he abandoned such purpose, and sought to escape, he may resist prosecutor's pursuit and assault by force, and plead self-defense.—Cox v. State, Tex., 123 S. W. 696.

8. **Attachment**—Debt Fraudulently Contracted.—Failure to accept and use a livery rig as agreed held a mere breach of contract which would not support an attachment on the ground of a debt fraudulently contracted.—Kilpatrick v. Inman, Colo., 105 Pac. 1080.

9. **Attorney and Client**—Undue Influence.—The presumption of an attorney's undue influence in case of a contract with his client does not apply where he openly assumes a hostile attitude to his client, nor to a contract creating the relation and fixing compensation.—Cooley v. Miller & Lux, Cal., 105 Pac. 981.

10. **Bankruptcy**—Right of Trustee.—A bankrupt's trustee takes title to the bankrupt's property, including that conveyed in fraud of creditors subject to outstanding equities to which it was subject in the bankrupt's hands.—Blake v. Meadows, Mo., 123 S. W. 868.

11. **Banks and Banking**—Receiving Deposits Illegally.—Where a bank remained open for the transaction of business and the reception of deposits, the law would presume that the president assented to the reception of such deposits as were shown by the bank's books.—Parrish v. Commonwealth, Ky., 123 S. W. 339.

12. **Bastards**—Legitimization.—An illegitimate child, legitimized by the subsequent marriage of its parents in accordance with laws of the place where the marriage took place and the parents were domiciled, is thereafter legitimate everywhere.—Finley v. Brown, Tenn., 123 S. W. 359.

13. **Benefit Societies**—Validity of By-Laws.—In the absence of a statute, a mutual insurance association may provide against liability under a policy if the insured should commit suicide, whether sane or insane.—Kunse v. Knights of the Modern Maccabees, Ind., 90 N. E. 89.

14. **Bills and Notes**—Consideration.—Where a mother signed a note for money borrowed to aid her sons in business, it was not essential to bind her as a principal contractor that the money should be paid over to her; but it was sufficient that it was paid to one of her sons at her direction.—Vandeventer v. Devis, Ark., 123 S. W. 766.

15.——Mistake of Law.—That a wife signed a mortgage note on statement that it did not bind her personally, but only her interest in the land, it was no defense unless the mistake was mutual.—Grant v. Isett, Kan., 105 Pac. 1021.

16.——Negotiability.—A stipulation in a conditional vendee's note that partial payments to any amount less than the price shall be taken as rent held to destroy the negotiability of the instrument.—Gilpin v. People's Bank, Ind., 90 N. E. 91.

17. **Boundaries**—Resurvey.—The purpose of a resurvey subsequent to taking title by purchasers and settlers is to ascertain the lines of the original survey and the location of the original boundaries as established—Bayhouse v. Urquides, Idaho, 105 Pac. 1066.

18. **Brokers**—Commissions.—An agent or owner cannot list property with a broker, and, after he has procured a purchaser at the agreed price, sell the land himself to such purchaser, and refuse to divide the commission with the broker. Dalke v. Sivyer, Wash., 105 Pac. 1031.

19. **Building and Loan Associations**—Borrowing Members.—A borrowing member of a building and loan association cannot avail himself of an agreement as to the number of payments that will mature his stock, not contained in his bond and mortgage.—Henry v. Continental Building & Loan Ass'n, Cal., 105 Pac. 960.

20. **Carriers**—Act of God.—Act of God resulting in further delay of a cattle shipment held no defense to the carrier's liability, where, but for previous delay, the shipment would have passed the point of obstruction before it occurred.—Chicago, R. I. & P. Ry. Co. v. Miles, Ark., 123 S. W. 775.

21.——Carriage of Live Stock.—A carrier of live stock must exercise ordinary care to prevent injury from the natural propensities of the animals, and is only exempt from liability from injuries, so caused where such cause was the proximate cause of the injury.—Galveston, H. & S. A. Ry. Co. v. Jones, Tex., 123 S. W. 737.

22.——Passenger Elevators.—A company operating a passenger elevator in an office building, held to be a common carrier of passengers.—Cooper v. Century Realty Co., Mo., 123 S. W. 848.

23. **Certiorari**—Scope of Review.—The scope of the writ of review is to review the determination of the lower tribunal when it has exceeded its jurisdiction or exercised the same erroneously in making such determination, and original relief cannot be secured thereby.—Elmore v. Tillamook County, Or., 105 Pac. 909.

24. **Chattel Mortgages**—Rights of Mortgagee.—Where a chattel mortgagee is lawfully in possession, and has irregularly foreclosed the mortgage and sold the property to another, the mortgagor may treat the transaction as a conversion of the property.—Swank v. Elwert, Or., 105 Pac. 901.

25. **Conspiracy**—Inducing Purchase of Worthless Stock.—In a prosecution for criminal conspiracy by inducing the purchase of worthless mining stock by false representations as to its value, proof of the falsity of the representations was essential to a conviction.—State v. Blake, Utah, 105 Pac. 910.

26. **Constitutional Law**—Drains.—Rev. St. 1899, c. 122, as amended by Laws 1905, p. 180, relat-

ing to drainage of swamp and overflow lands, held not violative of U. S. Const. Amend. 14 and Const. art. 2, sec. 30, relating to due process of law.—State v. Bugg, Mo., 123 S. W. 827.

27.——Drinking Intoxicants.—An ordinance against the drinking of intoxicating liquors in stairways, areaways, streets, alleys and sidewalks held void as invading personal liberty.—Coty of Carthage v. Block, Mo., 123 S. W. 483.

28.——Execution and Probate of Wills.—The rules imposed by statute for the probate of wills are obligatory on the courts not only as to the quantum of proof necessary to authorize probate, but also as to the particulars attending execution.—In re Noyes' Estate, Mont., 105 Pac. 1017.

29.——Parole of Prisoners.—The parole act, effective July 1, 1899, held to entitle a paroled prisoner to a hearing before the board of pardons upon his reimprisonment by the penitentary warden, so that section 4 did not deprive relator, a paroled prisoner, of his liberty without due process of law.—People v. Strassheim, Ill., 90 N. E. 118.

30. **Corporations**—Right to Hold Real Estate.—A foreign corporation held not entitled to take title to real estate, where a similar domestic corporation is prohibited from so doing by the statutory or constitutional law.—Proctor v. Board of Trustees of Methodist Episcopal Church, South, Mo., 123 S. W. 862.

31.——Trustees.—Where a corporation was without a board of trustees because of a deadlock among the stockholders, one faction was not responsible for failure to rebuild and operate the plant after its destruction by fire.—Weymouth v. Oudin, Wash., 105 Pac. 1027.

32.——Ultra Vires.—The doctrine of ultra vires cannot be invoked to defeat liability for an injury through negligence.—Burke v. State, 119 N. Y. Supp. 1089.

33. **Costs**—Executor and Administrator.—An administratrix in a state having given bond as such is not required to give bond for costs in an action in her fiduciary character, though a nonresident; Kirby's Dig. secs. 959, 960, 961, not being applicable.—Warren & O. V. R. Co. v. Waldrop, Ark., 123 S. W. 792.

34. **Courts**—Presumption.—Where the record is silent with respect to any fact necessary to give a court jurisdiction, it will be presumed that the court acted within its jurisdiction unless the contrary appears on the face of the record.—Flowers v. Reece, Ark., 123 S. W. 773.

35. **Covenants**—Incumbrances.—A covenant against incumbrances is breached by the unexpired term of a valid subsisting lease at the date of the execution of the deed.—O'Connor v. Enos, Wash., 105 Pac. 1039.

36.——Seisin.—As a covenant of seisin of an indefeasible estate in fee simple, which is broken when made, runs with the land, a subsequent grantee can sue the original covenantor for damages for a breach.—Coleman v. Lucksinger, Mo., 123 S. W. 441.

37. **Criminal Evidence**—Reception of Evidence.—Where a witness was asked a question as to whether another witness owned a pistol, the question was not objectionable as depriving defendant of the privilege of proving by the witness himself that he did not own a pistol, since it would not disqualify him to testify, and, although it did disqualify him, it would not render inadmissible testimony of other witnesses who were qualified.—Deckard v. State, Tex., 123 S. W. 417.

38.——Testimony of Accomplice.—The manner and means of inducing an accomplice to testify with a view to a lighter punishment are matters for argument to the jury, but it would be error to point out those facts, and tell the jury to specially consider them in weighing his testimony.—State v. Shelton, Mo., 122 S. W. 732.

39. **Criminal Trial**—Instructions.—In a prosecution for carrying a pistol, where accused's reputation as a peaceable citizen was admitted, and not denied, it was not reversible error to refuse an instruction that his reputation was admitted.—Hines v. State, Tex., 123 S. W. 411.

40.——Physical Examination of Accused.—In a murder case, held, that the court should, on accused's motion, allow accused to be taken from jail for an X-ray examination to show a fact which if proved would tend to strengthen his testimony.—Browder v. Commonwealth, Ky., 123 S. W. 328.

41.——Plea in Abatement.—Where a nolle prosequi had been entered on an indictment for a felonious assault, there was no error in overruling a plea of such indictment in abatement to an information for the same assault charged as a misdemeanor.—State v. Hussey, Mo., 123 S. W. 485.

42.——Self-Defense.—In a prosecution for killing the son of S. in a difficulty over the possession of a barn, evidence that S. had been advised by an attorney that he could hold the barn held inadmissible.—Smith v. State, Tex., 123 S. W. 698.

43. **Damages**—Measure.—In a suit for breach of a contract to use a livery rig to transport defendant to a certain place, a judgment for plaintiff for the entire contract price was excessive, since it allowed plaintiff more profits than he could have made had the trip been made.—Kilpatrick v. Inman, Colo., 105 Pac. 1080.

44.——Personal Injuries.—Recovery cannot be had for expenses incurred in nursing plaintiff, on testimony merely that trained nurses were employed, without any evidence as to the time of such employment, who employed them, or what they were paid.—Graefe v. St. Louis Transit Co., Mo., 123 S. W. 835.

45.——Stipulation in Lease.—A stipulation in a lease held not to stipulate any damages for the lessor's breach of a covenant therein, or authorize him to determine what sum should be allowed for such breach.—B. Roth Tool Co. v. Champ Spring Co., Mo., 123 S. W. 513.

46. **Dismissal and Nonsuit**—Dismissal as to Co-party.—Where a surety bond was joint and several, so that one having a right of action thereon could sue the principal and sureties or either of them, a discontinuance as to the principal in an action against him and the sureties was not a discontinuance as to the sureties.—Stevenson v. Stunkard, Ind., 90 N. E. 106.

47. **Drains**—Proceedings According to Law.—Dismissal of drainage proceedings by the board of commissioners held "proceeding according to law" in accordance with the order of the circuit court remanding the proceedings on the repeal of the drainage law without a saving clause.—Zintsmaster v. Aikin, Ind., 90 N. E. 82.

48. **Electricity**—Trespassers.—One killed by coming in contact with a live electric wire defectively insulated held, in his relation to the electric company, a trespasser, relieving the company from liability.—Rodgers' Adm'r v. Union Light, Heat & Power Co., Ky., 123 S. W. 293.

49. **Eminent Domain**—Damages Recoverable.—Where defendant's land was taken for a railroad right of way, after which defendant sold the same, an instruction that he could only recover such damages as accrued between the building of the embankment and the time of the sale was erroneous.—Boise Valley Const. Co. v. Kroeger, Idaho, 105 Pac. 1070.

50.——Measure of Damages.—In condemning a right of way for a telegraph line, the measure of damages held to be the value of the land actually occupied by the poles and the decrease in value of the land between the poles from the right of the telegraph company to use it jointly with the owner for repair and construction.—Illinois Telegraph News Co. v. Meine, Ill., 90 N. E. 230.

51.——Water Companies.—A water company held not authorized to condemn a right of way for a stub switch, connecting its plant with a railroad, to be used by the railroad company under its control, and to become a constituent part of its railway system.—Kinney v. Citizens' Water & Light Co. of Greenwood, Ind., 90 N. E. 129.

52. **Equity**—Statute of Limitations.—When a statute of limitation applied to a suit in equity, delay in commencing the suit for a period less than that of the statute is not a reason for dismissing the proceeding, unless accompanied by other circumstances.—Marsh v. Lott, Cal., 105 Pac. 968.

53. **Estoppel**—Married Women.—A married woman held not estopped from asserting the invalidity of the deed of her expectancy as heir of her father to secure separate debts of her

husband.—Taylor v. Swafford, Tenn., 123 S. W. 350.

54. **Evidence**—Commercial Reports.—Commercial reports as to a husband's credit held inadmissible as against the wife to show that his creditors extended credit on the faith of his ownership of the land in controversy.—Blake v. Meadows, Mo., 123 S. W. 868.

55.——Qualification of Expert.—An expert witness as to the value of cattle held competent to testify to the value of the cattle on their arrival at destination in an injured condition, and in the condition they would have been in had they not been injured.—Galveston, H. & S. A. Ry. Co. v. Jones, Tex., 123 S. W. 737.

56. **Executors and Administrators**—Sale of Land.—Purchaser at sale of land for payment of debts of decedent by order of court without jurisdiction held to acquire no title.—Scott v. Royston, Mo., 123 S. W. 454.

57.——Waiver of Right to Administer.—Where a widow signed a waiver of her right to administer the estate of her deceased husband, and she soon thereafter went to another state to reside, and thus became disqualified to act as administratrix, the court would not set aside her waiver.—Becker v. Orr, Ill., 90 N. E. 181.

58. **False Pretenses**—Elements of Offense.—Whether false pretenses were calculated to deceive so as to constitute a crime must be determined in connection with the capacity of the person defrauded.—McDowell v. Commonwealth, Ky., 123 S. W. 313.

59. **Fire Insurance**—Incumbrances.—Where a fire policy does not stipulate against incumbrances, the insurer's obligation is not impaired by the placing of an incumbrance on the property during the life of the policy.—Cooper v. American Cent. Ins. Co., Mo., 123 S. W. 497.

60. **Fixtures**—Heating Plant.—A heating plant placed in a building under a contract by the contractor held a fixture.—Peck-Hammond Co. v. Walnut Ridge Dist., Ark., 123 S. W. 771.

61. **Fraud**—False Representations.—A party inducing another to contract in reliance on estimates or opinions based on facts known to be false cannot escape responsibility by claiming he was only declaring an opinion.—Henry v. Continental Building & Loan Ass'n, Cal., 105 Pac. 960.

62. **Frauds, Statute Of**—Agreements Not to be Performed Within Year.—A verbal contract to superintend the making and gathering of a crop of cotton held not within the statute of frauds.—Valley Planting Co. v. Wise, Ark., 123 S. W. 768.

63.——Goods to be Manufactured.—A contract for the manufacture of articles on a special order not for the general market is not for the sale of goods within the statute of frauds.—Courtney v. Bridal Veil Box Factory, Ore., 105 Pac. 896.

64.——Parol Contract to Convey Land.—Where the promisor in a parol contract to convey land in consideration of the promisee rendering personal services refused to perform after the rendition of personal services, the law raised an implied contract to pay for such services.—Graham v. Graham, 119 N. Y. Supp. 1013.

65.——Part Performance.—If tenants take possession under an oral lease and plow, cultivate, and summer fallow the land, it is a part performance taking it out of the statute.—O'Connor v. Enos, Wash., 105 Pac. 1039.

66. **Fraudulent Conveyances**—Right to Plead Fraud.—Creditors of a husband, with knowledge that the purchase price of certain land, the title to which was taken in the name of the husband, was furnished by the wife and her mother, held not entitled to claim that a subsequent conveyance by the husband to the wife was a fraud on them.—Blake v Meadows, Mo., 123 S. W. 868.

67. **Guardian and Ward**—Nature of Office of Guardian.—Guardians and curators are creatures of the law, and are statutory officers of the court, and have no inherent powers, but only such as are prescribed by statute.—Scott v. Royston, Mo., 123 S. W. 454.

68. **Homestead**—Abandonment.—Where a widow remarried before a proceeding to sell her deceased husband's land, and moved to a farm owned by her second husband, there was an abandonment of her homestead in the land of her first husband.—Stobaugh v. Irons, Ill., 90 N. E. 272.

69. **Husband and Wife**—Estoppel in Pais.—A married woman held not subject to the full application of the doctrine of estoppel in pais.—Blake v. Meadows, Mo., 123 S. W. 868.

70.——Torts of Wife.—The common-law rule that the husband is liable for the slanderous words uttered by his wife held not abrogated by the married woman's act.—Jackson v. Williams, Ark., 123 S. W. 751.

71. **Improvements**—By Persons Without Title.—One without title to a lot could acquire no right to compensation by improving it.—Maciejewska v. Jarzombek, Ill., 90 N. E. 231.

72. **Injunction**—Damages Recoverable for Wrongful Issuance.—For a wrongful injunction against the working of a coal mine by lessees, they are entitled to recover on the bond such damages as were the direct and proximate result of the service of the writ.—Silka v. Quinn, Colo., 105 Pac. 1104.

73. **Innkeepers**—Rule of Liability.—The rules of liability between innkeepers and their guests held inapplicable where one, not a guest at a hotel, left a valise there with the person in charge of the coatroom.—Bean v. Ford, 119 N. Y. Supp. 1074.

74. **Insane Persons**—Release.—Where mental incapacity is pleaded to avoid a release, the failure to disaffirm within a reasonable time after being restored to competency to contract must be specially pleaded by the other side to be available.—Alamo Dressed Beef Co. v. Yeargan, Tex., 123 S. W. 721.

75. **Judgment**—Conformity to Pleadings.—A judgment cannot be entered upon a petition or answer which manifestly discloses no cause of action or grounds of defense, though its verity be admitted or proved, even though the opposite party did not except to the pleading.—Singeltary v. Goeman, Tex., 123 S. W. 436.

76.——Persons Bound by Decree.—A purchaser by a parol sale of an heir's interest in land should appear, and, under a power of attorney from the heir authorizing him to receive his interest, claim distribution on final settlement, and, failing to do so, he is bound by the decree.—Cooley v. Miller & Lux, Cal., 105 Pac. 981.

77. **Landlord and Tenant**—Constructive Eviction.—If the plaster of rented premises was in such bad order as to interfere seriously and with the beneficial use of the premises, there was an eviction though the plaster did not actually menace the safety of the tenants.—Vromania Apartments Co. v. Goodman, Mo., 123 S. W. 543.

78.——Enforcement of Lien.—In an action against a landlord by the tenant for conversion of the property of the tenant by an unlawful enforcement of the lien of the landlord for rent on the property, the landlord can offset his lien for rent against the damages of the tenant.—Swank v. Elwert, Ore., 105 Pac. 901.

79.——Lease.—A bare acceptance by a landlord of a surrender of a prior lease and the granting of a new lease to the tenant, held not a waiver of liability existing at the time against the tenant on covenants of the lease.—Herboth v. American Radiator Co., Mo., 123 S. W. 533.

80.——Option to Renew Lease.—Where a lease provides for an additional term at an increased rental, and the tenant holds over, if he pays such increased rental, it is evidence that he has exercised the option to lease for an additional term.—Carhart v. White Mantel & Tile Co., Tenn., 123 S. W. 747.

81. **Licenses**—Occupation—The state under police power may license and regulate chattel mortgage and salary loan brokers.—Sanning v. City of Cincinnati, Ohio, 90 N. E. 125.

82. **Life Estates**—Asquisition of Outstanding Claim.—That a mortgagee was the guardian in socage of the remainderman in fee in mortgaged property does not render the purchase by him absolutely void; but the mortgagee being also the life tenant, and so bound to discharge the interest on the mortgage, the purchase was voidable at the election of his infant ward.—Jefferson v. Bangs, N. Y., 90 N. E. 109.

83. **Master and Servant**—Assumption of Risk.—One engaged in constructing a railroad track held not entitled to recover for an injury sustained by the derailment of a train, because the construction had not proceeded far enough

to make the track safe.—Southern Ry. Co. v. Bufkins, Ind., 90 N. E. 98.

84.——Assumption of Risk.—A servant assisting in removing a shaft from a pulley held not to assume, as a matter of law, the risk of injury resulting from a fellow servant striking the shaft with a scantling pursuant to the order of the foreman.—Texas & P. Ry. Co. v. Jones, Tex., 123 S. W. 434.

85.——Defective Appliances.—A defect in an appliance procured by a master from a reputable dealer, which ordinary care in the course of reasonable inspection will disclose, is not a latent defect, but is a defect for which the master, in the performance of his duty of inspection, is responsible.—Alamo Dressed Beef Co. v. Yeargan, Tex., 123 S. W. 721.

86.——Duty to Warn Servant.—Where the business is a dangerous one, and the master, with notice of the servant's ignorance of the danger, fails to properly warn him, he cannot escape responsibility because he used the utmost care to reduce the danger.—Pigeon v. W. P. Fuller & Co., Cal., 105 Pac. 976.

87.——Frightening Traveler's Horse.—The driver of a team so decorated as to frighten plaintiff's horse and injure his wife held defendant's servant, and not an independent contractor.—Patton-Worsham Drug Co. v. Drennon, Tex., 123 S. W. 705.

88.——Injury to Brakeman.—A brakeman, injured by the pulling out of a defective handhold, held not charged with notice thereof, unless he had actual knowledge thereof, or must have obtained such knowledge in the ordinary course of his duty.—Missouri, K. & T. Ry. Co. of Texas v. Hawley, Tex., 123 S. W. 726.

89.——Railroad Trackman.—A railroad trackman must not place himself in such a position that he cannot see an approaching train or permit himself to be so engrossed as will prevent him from protecting himself, and if he does so, no recovery can be had for his death.—Degonia v. St. Louis, I. M. & S. Ry. Co., Mo., 123 S. W. 807.

90.——Rules of Master.—Rules of a master violated with its knowledge held abrogated, so as not to affect right to recover for injury to a servant.—St. Louis, I. M. & S. Ry. Co. v. York, Ark., 123 S. W. 376.

91.——Safe Place to Work.—Defendant railroad, in permitting grass to grow up around rails and conceal them from view, was liable for injuries to a section hand falling over them while carrying ties.—Texas & P. Ry. Co. v. Tuck, Tex., 123 S. W. 406.

92. **Mechanic's Liens**—Notice of Lien.—The date of furnishing materials for a building as given in the notice of lien therefor, cannot, by extrinsic evidence, be carried back to a prior date, so as to give the lien priority over another lien on the premises.—May v. Mode, Mo., 123 S. W. 523.

93. **Mines and Minerals**—Abandonment.—Senior locator may abandon right in land and render the ground subject to relocation before expiration of time within which annual labor must be performed.—Swanson v. Kettler, Idaho, 105 Pac. 1059.

94. **Mines and Minerals**—Certificate of Location.—An amended certificate, filed because of defects in the original location certificate of a mining location, may not include territory so as to injuriously affect intervening rights.—Washington Gold Min. & Mill. Co. v. O'Laughlin, Colo., 105 Pac. 1092.

95.——Fraudulent Entryman.—By a fraudulent entry on coal land, a claimant never acquired any rights to the premises, and his alleged title was void ab initio, and he acquired no superior title to a coal mine thereon pending cancellation of his entry, and his obtaining of an injunction on the strength of his supposed rights before his entry was canceled was as much of a fraud on the court's jurisdiction as was his entry a fraud on the government.—Baldwin Star Coal Co. v. Quinn, Colo., 105 Pac. 1101.

96. **Money Received**—Money Obtained by False Representations.—Where defendant induced plaintiff to pay for certain land contracts by fraudulent representations as to the value of the land, etc., made in order to defraud plaintiff, plaintiff could recover, as for money had and received, the money paid defendant under the contracts.—Steel v. Brazier, Mo., 123 S. W. 477.

97. **Municipal Corporations**—Contracts.—Where council by ordinance appropriate money and order directors of public safety to enter into contracts, a particular contract made in conformity with the ordinance need not be approved by the council.—City of Akron v. Dobson, Ohio, 90 N. E. 123.

98.——Frightening Traveler's Horse.—An individual who does anything to frighten a traveler's horse is liable for any damages which may result from the fright either to the owner or to any person whom the frightened horse may injure.—Patton-Worsham Drug Co. v. Drennon, Tex., 123 S. W. 705.

99.——Intoxicating Liquors.—An ordinance against the drinking of intoxicating liquors on the streets, alleys, and sidewalks of the city is within the general police power given to cities of the third class by Rev. St. 1899, § 5834 (Ann. St. 1906, p. 2949).—City of Carthage v. Block, Mo., 123 S. W. 483.

100.—Negligence.—Where the proximate cause of decedent's death was an attack of vertigo, in connection with the city's negligence in permitting the boulevard of a street to be obstructed by railroad rails on which decedent fell, the city was liable.—Woodson v. Metropolitan St. Ry. Co., Mo., 123 S. W. 820.

101.——Rebate of Special Assessments.—An ordinance providing for the rebate of special assessments held to relate only to the case where the owner at the time the assessment was paid was the owner at the time of the payment into the treasury of the money to be rebated.—Savage-Scofield Co. v. City of Tacoma, Wash., 105 Pac. 1032.

102. **Negligence**—Cause of Injury.—Where the injury may have resulted from one or two causes, for one of which and not the other, defendant is liable, plaintiff must show that the case for which defendant is liable produced the injury; and, if the evidence leaves it uncertain, plaintiff cannot recover.—Graefe v. St. Louis Transit Co., Mo., 123 S. W. 835.

103.——Dangerous Instrumentalities.—One kindling a fire must use care to prevent it from damaging his neighbor in proportion to the risk reasonably to be apprehended.—J. Q. Lloyd Chemical Co. v. G. Mathes & Sons Rag Co., Mo., 123 S. W. 528.

104.——Turntables.—If a railroad company can with slight expense and little inconvenience keep its turntables guarded or locked so as to prevent trespassing children using them, they should be compelled to do so, and if they fail, they are liable for any injury to children of tender years, playing with them.—Brown v. Chesapeake & O. Ry. Co., Ky., 123 S. W. 298.

105. **Nuisance**—Abatement.—If a building is a public nuisance, the fact that an ordinance declaring it such and ordering its abatement is invalid because not legally passed will not prevent the town from proceeding in equity for its abatement.—Incorporated Town of Lonoke v. Chicago, R. I. & P. R. Co., Ark., 123 S. W. 353.

106. **Partnership**—Community of Interest.—Before there can be a partnership between the parties they must have joined to carry on a trade or adventure, and there must be community of interest in the property.—Roach v. Rector, Ark., 123 S. W. 399.

107. **Principal and Agent**—Authority of Agent.—Where an agent undertakes to act for a principal without authority, though in good faith, he is liable to the person with whom he contracts for the damages sustained because of such want of authority.—Roberts v. Tuttle, Utah, 105 Pac. 916.

108.——Liability for Acts of Agent.—A principal's liability for the acts of his agent is not limited to the precise acts authorized, but extends to whatever usually belongs to the doing of such acts or is necessary to their performance.—Roach v. Rector, Ark., 123 S. W. 399.

109.——Set-off or Counter Claim.—The general manager of plaintiff's mercantile business held authorized to agree to set off a claim against defendant for goods sold, against a claim for goods purchased for use in the business, assigned to defendant.—Grubbs v. Nixon, Ark., 123 S. W. 785.

110. **Railroads**—Bonus Contract.—A bonus contract, providing for payment when an electric railroad was in operation "to the strip of

land above described," did not require that it should be in operation on or over the strip described.—Boise Valley Const. Co. v. Kroeger, Idaho, 105 Pac. 1070.

111.——Injury to Alighting Passenger.—In an action for injuries to a passenger while alighting from a moving train at his station, evidence held to require the submission to the jury of the issue whether he exercised reasonable care in alighting, though the station was not announced.—Chesapeake & O. R. Co. v. Robinson, Ky., 123 S. W. 308.

112.——Injury to Passenger.—In an action against a railroad company for personal injuries from jumping off a section of a parted train which was running down grade, evidence held to warrant submission to the jury whether plaintiff left the train on account of the peril he apprehended from a threatened wreck.—Prescott & N. W. Ry. Co. v. Morris, Ark., 123 S. W. 392.

113.——Injury to Person Loading Car.—The act of an employee of a chair factory in remaining in a car that he was loading until it was hit by a freight engine held not contributory negligence as a matter of law.—St. Louis, I. M. & S. Ry. Co. v. Clements, Ark., 123 S. W. 783.

114.——Killing Animals on Track.—Dogs are personal property for the negligent killing of which a railroad company is liable.—St. Louis, I. M. & S. Ry. Co. v. Rhoden, Ark., 123 S. W. 798.

115.——Look and Listen.—While one crossing a railroad track at a public crossing may rely upon the assurance that the way is safe, implied from the crossing gates being open, and cross without looking or listening, he cannot proceed blindly and refuse to see or hear obvious dangers.—Chicago, R. I. & P. Ry. Co. v. Hamilton, Ark., 123 S. W. 379.

116.——Occupation of Streets.—The public has an equal right with a railroad company to the free use of a highway upon which the railroad track is laid, and the railroad company will not be permitted to omit any reasonable duty that may tend to the safety of the public upon such street.—Laury v. Northern Pac. Terminal Co., Or., 105 Pac. 881.

117. **Religious Societies**—Right to Hold Real Estate.—A foreign corporation held a religious corporation, incapable of holding real estate under a devise for the use and benefit of a training school.—Proctor v. Board of Trustees of Methodist Episcopal Church, South, Mo., 123 S. W. 862.

118. **Sequestration**—Affidavit for Writ.—Where the basis for a writ of sequestration was a sworn petition, which contained no allegation of value, as required by the statute, the trial court erred in not quashing the proceedings.—Cleghon v. Boxley, Tex., 123 S. W. 438.

119. **Set-off and Counterclaim**—Contingent Claim.—In an action by a lessee on a note and mortgage given by his assignee of the term, held not error to refuse to allow the assignee damages on a counterclaim for breach of an agreement to secure the lessor's written consent to the assignment of the lease.—Batley v. Dewalt, Wash., 105 Pac. 1029.

120. **Specific Performance**—Parol Sale of Land.—A parol sale of land without delivery of possession, though the price is fully paid, is wholly void and gives no right to specific performance.—Cooley v. Miller & Lux, Cal., 105 Pac. 981.

121. **States**—Action on Bond.—A provision of a builder's bond requiring payment of laborers' and materialmen's claims must be regarded as a promise without consideration, where no such stipulation was contained in the contract.—State Board of Agriculture v. Dimick, Colo., 105 Pac. 1114.

122. **Street Railroads**—Care Required.—A street railway company in the running of its cars is required to exercise ordinary care to avoid injuring a person rightfully using the streets, regardless of any statutory regulation.—Swanson v. Chicago City Ry. Co. Ill., 90 N. E. 210.

123.——Injury to Servant.—Where plaintiff attempted to board a street car after being warned by the motorman not to do so, and the car could not, with ordinary care be stopped in less than 35 to 45 feet, defendant is not liable for injuries received by plaintiff while being dragged that distance, but would be liable only for injuries received after the car had traveled that distance.—Graefe v. St. Louis Transit Co., Mo., 123 S. W. 835.

124.——Liability of Lessor of Road.—The lease of a street railroad, giving the lessee entire control of its operation for a term of years, relieves the lessor from liability for injury resulting from the negligence of the lessee's employees.—Graefe v. St. Louis Transit Co., Mo., 123 S. W. 835.

125. **Subrogation**—Payment of Debts.—An administrator who has paid a debt of the estate with assets which he is compelled to refund to the widow, may resort to any remedy that the creditor would have against unadministered assets.—Flowers v. Reece, Ark., 123 S. W. 773.

126. **Taxation**—Equalization.—Under Acts 1909, p. 764, secs. 11, 12, the State Tax Commission, acting as a state board of equalization, has no power to equalize individual assessments on the complaint of the taxpayer.—Bank of Jonesboro v. Tax Commission, Ark., 123 S. W. 753.

127. **Trusts**—Constructive Trusts.—If defendant and his brother entered and surveyed certain land with the understanding that each would obtain a patent in his own name for his part thereof, and defendant after his brother's death, obtained the patents in his own name, a trust resulted by implication in favor of the privies of his brother.—Gibson v. Bartley, Ky., 123 S. W. 324.

128. **Vendor and Purchaser**—Contract to Convey.—An equitable defense in ejectment, relying on testator's nonperformed contract to convey the land to defendant in consideration of services, was unsustainable in the absence of proof of the contract with certainty, and of a substantial and meritorious performance beyond a reasonable doubt.—McQuinn v. Moore, Mo., 123 S. W. 858.

129. **Waters and Water Courses**—Collection.—A railroad company is required, by proper trestles, to permit the natural flow of water, whether surface or not.—St Louis, I. M. & S. Ry. Co. v. Magness, Ark., 123 S. W. 786.

130.——Irrigation.—In an action to recover a one-sixth interest in a ditch, in which it is shown that for more than 30 years one-eighth had been used and claimed, evidence held to sustain a finding that plaintiff had only the one-eighth interest.—Allen v. Swadley, Colo., 105 Pac. 1100.

131.——Pollution of Stream.—A landowner having appropriated the waters of a stream for irrigation held entitled to recover damages from a mill-owner who polluted the stream by poisonous substances from his concentrating mill. — Humphreys Tunnel & Mining Co. v. Frank, Colo., 105 Pac. 1093.

132. **Weapons**—Unlawfully Carrying.—In a prosecution for unlawfully carrying a pistol, an instruction held not objectionable as charging that accused must have had reasonable grounds for fearing an unlawful attack at the very time he armed himself, in order to authorize an acquittal, and to be proper.—Hines v. State, Tex., 123 S. W. 411.

133. **Wills**—Construction.—The words of the residuary clause of a deed, "the balance of any and all property that may be mine at the time of my death," held ambiguous, so that they could be shown, by deeds executed by testatrix at the same time, and as part of the same transaction, to be intended to cover land which she considered to belong to her as sole heir of an intestate.—Packard v. De Miranda, Tex., 123 S. W. 710.

134.——Estates Devised.—A devisee in fee of an undivided interest in real estate, which vests immediately at testator's death, subject to termination on the happening of a designated subsequent act or event, is an interest in realty which is transferable by the devisee.—Newlove v. Mercantile Trust Co. of San Francisco, Cal., 105 Pac. 971.

135. **Witnesses**—Intoxicating Liquors.—An alleged minor to whom it was claimed defendant illegally sold liquor having denied purchasing such liquor on the date in question, the state was properly permitted to ask him on cross-examination whether he had not been drinking on that evening.—State v. McCormick, Wash., 105 Pac. 1037.